U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 30 April 2007

In the Matter of:

D.C. , Case No.: 2005-BLA-5005
Claimant

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

Appearances:

Joseph Wolfe, Esq.
Wolfe, Williams, and Rutherford
Norton, Virginia
For the Claimant

Donna Sonner, Esq.
U.S. Department of Labor
Office of Solicitor
Nashville, Tennessee
For the Director, OWCP

Before: Alice M. Craft
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901, *et seq*. The Act and implementing regulations, 20 CFR Parts 410, 718, 725, and 727, provide compensation and other benefits to living coal miners who are totally disabled due to pneumoconiosis and their dependents, and surviving dependents of coal miners whose death was due to pneumoconiosis. The Act and regulations define pneumoconiosis, commonly known as black lung disease, as a chronic dust disease of the lungs and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. 30 U.S.C. § 902(b); 20 CFR § 718.201 (2006). In this case, the Claimant alleges that he is totally disabled by pneumoconiosis.

I conducted a hearing on this claim on March 30, 2005, in Knoxville, Tennessee. Both parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure before the Office of Administrative Law Judges, 29 CFR Part 18

(2006). At the hearing, the Claimant was the only witness. Transcript ("Tr.") at 3. Director's Exhibits ("DX") 1-18 and Administrative Law Judge's Exhibit ("ALJ") 1 were admitted into evidence without objection. Tr. at 6 and 8.

In reaching my decision, I have reviewed and considered the entire record, including all exhibits, the testimony at hearing and the arguments of the parties.

PROCEDURAL HISTORY

The Claimant filed his initial claim on February 27, 1992. DX 1. The claim was denied by the District Director of the Office of Workers' Compensation Programs ("OWCP") on July 19, 1992, on the grounds that the evidence did not show that the Claimant had pneumoconiosis, or that it was caused by coal mine work, or that the Claimant was totally disabled. The Claimant did not appeal that determination. DX 1.

More than one year later, the Claimant filed a duplicate claim. The duplicate claim was denied by District Director on September 23, 1998, on the grounds of abandonment. The Claimant did not appeal the denial. DX 2.

The Claimant filed another claim on June 26, 2002. He withdrew that claim. DX 3.

The Claimant filed his current claim on January 20, 2004. DX 5. The Director issued a proposed Decision and Order denying benefits on August 13, 2004. DX 13. The Claimant appealed on August 27, 2004. DX 14. The claim was referred to the Office of Administrative Law Judges for hearing on September 28, 2004. DX 15.

APPLICABLE STANDARDS

This claim relates to a "subsequent" claim filed on January 20, 2004. Because the claim at issue was filed after March 31, 1980, and after January 19, 2001, the effective date of the current regulations, the current regulations at 20 CFR Parts 718 and 725 apply. 20 CFR §§ 718.2 and 725.2 (2006). Pursuant to 20 CFR § 725.309(d) (2006), in order to establish that he is entitled to benefits, the Claimant must demonstrate that "one of the applicable conditions of entitlement … has changed since the date upon which the order denying the prior claim became final" such that he now meets the requirements for entitlement to benefits under 20 CFR Part 718. In order to establish entitlement to benefits under Part 718, the Claimant must establish that he suffers from pneumoconiosis, that his pneumoconiosis arose out of his coal mine employment, and that his pneumoconiosis is totally disabling. 20 CFR §§ 718.1, 718.202, 718.203, 718.204, and 725.103 (2006). I must consider the new evidence and determine whether the Claimant has proved at least one of the elements of entitlement previously decided against him. If so, then I must consider whether all of the evidence establishes that he is entitled to benefits. *Sharondale Corp. v. Ross*, 42 F.3d 993 (6th Cir. 1994). In this case, the Director stipulated that the Claimant has pneumoconiosis arising from his coal mine employment. This constitutes a change in one of the applicable conditions of entitlement. Therefore, I must address

all of the medical evidence from the current and previous claims in this decision.[1] Evidence admitted in the prior claim may be considered notwithstanding the limitations on the introduction of evidence contained in 20 CFR § 725.414 (2006). 20 CFR § 725.309(d)(1) (2006).

ISSUES

The issues contested by the Director, OWCP, are:

1. Whether the Claimant is totally disabled.

2. Whether his disability is was due to pneumoconiosis.

DX 15; Tr. 5. The Claimant alleged 31 years of coal mine work; the Director stipulated that the Claimant had 12.5 years of coal mine employment. Tr. at 5.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Factual Background and the Claimant's Testimony

The Claimant testified at the hearing that he was born in 1948. Tr. 9. He has a sixth grade education. DX 1. He was married from 1971 to 1999, when he divorced. Tr. 9. His 19-year-old son is working. Tr. 26. According to his application, DX 5, he has a disabled daughter, but she is also married, and not dependent on him.

The Claimant said he went to work in the mines at age 19, in 1966, Tr. 9; his application said 1968, DX 5. In the early years he worked in a mine he owned with his six brothers, and was paid in cash. Tr. 12. They operated the mines under different names, including Campbell Coal Company and Horse Creek Coal Company. Tr. 13. The Claimant was the foreman. Tr. 14. The mine shut down in 1998. Tr. 17. He said he worked over 28 years underground.[2] Tr. 18. His last coal mine employment was in Tennessee. DX 2. Therefore, this claim is governed by the law of the Sixth Circuit. *Shupe v. Director, OWCP*, 12 B.L.R. 1-200, 1-202 (1989) (*en banc*).

The Claimant testified that he has difficulty breathing, and he would not be able to go back and work in the mines. Tr. 19, 23. He said he smoked less than a pack of cigarettes in a

[1] The Claimant underwent a medical examination in connection with the claim he withdrew. However, neither party has designated the results of the medical examination from that claim as evidence on which it relies. I have not considered it in view of the regulation stating that a withdrawn claim should be treated as if it had never been filed. 20 CFR § 725.306. Even had I considered it, it would not change the outcome of the case, as the examining physician found that the Claimant had pneumoconiosis with a mild impairment, and should not return to the mines. That recommendation does not constitute a finding of disability, because it does not foreclose comparable work in a dust-free environment. *See Zimmerman v. Director, OWCP*, 871 F2d 564, 567 (6th Cir. 1989).

[2] The District Director, OWCP, did not mark the number of years of coal mine employment as an issue on the CM 1025. *See* DX 15. I credit the Claimant's testimony that he was paid in cash for some of his work in a family-owned mine. As a result, not all of his earnings would be reflected on his Social Security records, DX 8. Although the Director, OWCP, stipulated to only 12.5 years of coal mine employment, I find that the issue was waived, and the Claimant should be credited with at least 28 years of coal mine employment based on his consistent testimony, employment history forms, and reports to doctors who examined him.

year for about two years. Tr. 14, 25-26. At the time of the hearing, he had been receiving Social Security disability benefits for four or five years. He did not recall the basis for his disability payments. Tr. 21. His family doctor is Dr. Wood, and he has been prescribed an inhaler for his breathing. Tr. 23-24.

Medical Evidence

Chest X-rays

Chest x-rays may reveal opacities in the lungs caused by pneumoconiosis and other diseases. Larger and more numerous opacities result in greater lung impairment. The following table summarizes the x-ray findings available in this case. X-ray interpretations submitted by the parties in connection with the current claim were in accordance with the limitations contained in 20 CFR § 725.414 (2006). Treatment records and records from the prior claim are not subject to the limitations.

The existence of pneumoconiosis may be established by chest x-rays classified as category 1, 2, 3, A, B, or C according to ILO-U/C International Classification of Radiographs. Small opacities (1, 2, or 3) (in ascending order of profusion) may classified as round (p, q, r) or irregular (s, t, u), and may be evidence of "simple pneumoconiosis." Large opacities (greater than 1 cm) may be classified as A, B or C, in ascending order of size, and may be evidence of "complicated pneumoconiosis." A chest x-ray classified as category "0," including subcategories 0/-, 0/0, 0/1, does not constitute evidence of pneumoconiosis. 20 CFR § 718.102(b) (2006). Any such readings are therefore included in the "negative" column.

Physicians' qualifications appear after their names. Qualifications of physicians who classified opacities observed on x-ray have been obtained where shown in the record by curriculum vitae or other representations, or if not in the record, by judicial notice of the lists of readers issued by the National Institute of Occupational Safety and Health (NIOSH), and/or the registry of physicians' specialties maintained by the American Board of Medical Specialties. [3] Qualifications of physicians are abbreviated as follows: A= NIOSH certified A reader; B= NIOSH certified B reader; BCR= board-certified in radiology. Readers who are board-certified radiologists and/or B readers are classified as the most qualified. See *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 145 n. 16 (1987); *Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1276 n.2 (7th Cir. 1993). B readers need not be radiologists.

[3]NIOSH is the federal government agency that certifies physicians for their knowledge of diagnosing pneumoconiosis by means of chest x-rays. Physicians are designated as "A" readers after completing a course in the interpretation of x-rays for pneumoconiosis. Physicians are designated as "B" readers after they have demonstrated expertise in interpreting x-rays for the existence of pneumoconiosis by passing an examination. Historical information about physician qualifications appears on the U.S. Department of Health and Human Services, Comprehensive List of NIOSH Approved A and B Readers, February 2, 2007, found at http://www.oalj.dol.gov/PUBLIC/BLACK_LUNG/REFERENCES/REFERENCE_WORKS/BREAD3_02_07.HTM . Current information about physician qualifications appears on the CDC/NIOSH, NIOSH Certified B Readers List found at http://www.cdc.gov/niosh/topics/chestradiography/breader-list.html. Information about physician board certifications appears on the web-site of the American Board of Medical Specialties, found at http://www.abms.org.

Date of X-ray	Read as Positive for Pneumoconiosis	Read as Negative for Pneumoconiosis
04/29/92		DX 1 Cohen BCR DX 1 Sargent BCR, B ILO Classification 0/1
03/11/04	DX 10 Forehand B ILO Classification 1/1 DX 10 Barrett B, BCR ILO Classification 1/1	

Pulmonary Function Studies

Pulmonary function studies are tests performed to measure obstruction in the airways of the lungs and the degree of impairment of pulmonary function. The greater the resistance to the flow of air, the more severe the lung impairment. Tests most often relied upon to establish disability in black lung claims measure forced vital capacity (FVC), forced expiratory volume in one-second (FEV_1) and maximum voluntary ventilation (MVV).

The following chart summarizes the results of the pulmonary function studies available in this case. Testing can be perform before and after administration of bronchodilators. In this case, bronchodilators were not administered in either test. In a "qualifying" pulmonary study, the FEV_1 must be equal to or less than the applicable values set forth in the tables in Appendix B of Part 718, and either the FVC or MVV must be equal to or less than the applicable table value, or the FEV_1/FVC ratio must be 55% or less. 20 CFR § 718.204(b)(2)(i) (2006).

Ex. No. Date Physician	Age Height[4]	FEV_1 Pre-/ Post	FVC Pre-/ Post	FEV_1/ FVC Pre-/ Post	MVV Pre-/ Post	Qualify?	Physician Impression
DX 1 04/29/92 Sargeant	44 73"	3.75	4.76	79%	112	No	Normal.
DX 10 03/11/04 Forehand	55 72"	3.38	4.49	75%		No	Normal ventilatory pattern.

[4] The fact-finder must resolve conflicting heights of the miner recorded on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1-221, 1-223 (1983); *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 114, 116 (4th Cir. 1995). As there is a variance in the recorded height of the miner from 72" to 73", I have taken the mid-point (72.5") in determining whether the studies qualify to show disability under the regulations. Neither of the tests was qualifying to show disability, whether considering the mid-point, or the heights listed by the persons who administered the testing.

Arterial Blood Gas Studies

Blood gas studies are performed to measure the ability of the lungs to oxygenate blood. A defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. The blood sample is analyzed for the percentage of oxygen (PO_2) and the percentage of carbon dioxide (PCO_2) in the blood. A lower level of oxygen (O_2) compared to carbon dioxide (CO_2) in the blood indicates a deficiency in the transfer of gases through the alveoli which may leave the miner disabled.

The following chart summarizes the arterial blood gas studies available in this case. A "qualifying" arterial gas study yields values which are equal to or less than the applicable values set forth in the tables in Appendix C of Part 718. If the results of a blood gas test at rest do not satisfy Appendix C, then an exercise blood gas test can be offered.

Exhibit Number	**Date**	**Physician**	**PCO_2 at rest/ exercise**	**PO_2 at rest/ exercise**	**Qualify?**	**Physician Impression**
DX 1	04/29/92	Sargeant	39 39	100 102	No No	Normal.
DX 10	03/11/04	Forehand	37 34	68 74	No No	No evidence of resting or exercise induced arterial hypoxemia.

Medical Opinions

Medical opinions are relevant to the issues of whether the miner has pneumoconiosis, whether the miner is totally disabled, and whether pneumoconiosis caused the miner's disability. A determination of the existence of pneumoconiosis may be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers from pneumoconiosis as defined in § 718.201. 20 CFR §§ 718.202(a)(4) (2006). Thus, even if the x-ray evidence is negative, medical opinions may establish the existence of pneumoconiosis. *Taylor v. Director, OWCP*, 9 B.L.R. 1-22 (1986). The medical opinions must be reasoned and supported by objective medical evidence such as blood gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. 20 CFR § 718.202(a)(4) (2006). Where total disability cannot be established by pulmonary function tests, arterial blood gas studies, or cor pulmonale with right-sided heart failure, or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may be nevertheless found, if a physician, exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment, i.e., performing his usual coal mine work or comparable and gainful work. 20 CFR § 718.204(b)(2)(iv) (2006). With certain specified exceptions not applicable here, the cause or causes of total disability must be established by means of a physician's documented and reasoned report. 20 CFR § 718.204(c)(2) (2006). The record contains the following medical opinions relating to this case.

Dr. Sargeant examined the Claimant on behalf of the Department of Labor on April 29, 1992, in connection with the first claim. DX 1. His qualifications are not in the file, and he is not listed on the web-site of the American Board of Medical Specialties. He took occupational, social, family and medical histories, and conducted a physical examination, chest x-ray, blood gas studies and pulmonary function testing. He reported that the Claimant worked in the mines for 31 years. He reported that the Claimant never smoked. The chest examination was normal. Dr. Sargeant read the x-ray as showing no evidence of coal workers' pneumoconiosis. The pulmonary function test was normal. The arterial blood gas study was normal. Dr. Sargeant opined that the Claimant did not suffer pneumoconiosis because all the test results were normal.

Dr. Forehand examined the Claimant on behalf of the Department of Labor on March 11, 2004. DX 10. Dr. Forehand is board-certified in pediatrics, allergies and immunology, and a B reader. He took occupational, social, family and medical histories, and conducted a physical examination, chest x-ray, electrocardiogram, blood gas studies and pulmonary function testing. He reported that the Claimant worked in the mines for 28 years. He reported that the Claimant never smoked. The chest examination was normal. Dr. Forehand read the x-ray as showing coal workers' pneumoconiosis. The pulmonary function test was normal. The arterial blood gas study was normal. Dr. Forehand diagnosed coal workers' pneumoconiosis. Dr. Forehand opined that the Claimant's pneumoconiosis was due to coal mine dust exposure. Additionally, Dr. Forehand found no respiratory impairment.

Existence of Pneumoconiosis

The regulations define pneumoconiosis broadly:

> (a) For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical", pneumoconiosis and statutory, or "legal", pneumoconiosis.
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> (1) Clinical Pneumoconiosis. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silico-tuberculosis, arising out of coal mine employment.
>
> (2) Legal Pneumoconiosis. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.
>
> (b) For purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

(c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

20 CFR § 718.201 (2006). In this case, the Director, OWCP, stipulated that the Claimant suffers from pneumoconiosis. The most recent x-ray evidence, and Dr. Forehand's opinion, support the conclusion that the Claimant has simple clinical pneumoconiosis. There is no recent evidence to the contrary. Thus, this element is satisfied, and the Claimant has established a change in one of the applicable conditions of entitlement.

Causal Relationship Between Pneumoconiosis and Coal Mine Employment

The Act and the regulations provide for a rebuttable presumption that pneumoconiosis arose out of coal mine employment if a miner with pneumoconiosis was employed in the mines for ten or more years. 30 U.S.C. § 921(c)(1); 20 CFR § 718.203(b) (2006). The Claimant was employed as a miner for at least 28 years, and therefore is entitled to the presumption. The Director, OWCP, has also stipulated to this element of the Claimant's claim. I conclude that the Claimant's pneumoconiosis was caused by his coal mine employment.

Total Pulmonary or Respiratory Disability

A miner is considered totally disabled if he has complicated pneumoconiosis, 30 U.S.C. § 921(c)(3), 20 CFR § 718.304 (2006), or if he has a pulmonary or respiratory impairment to which pneumoconiosis is a substantially contributing cause, and which prevents him from doing his usual coal mine employment and comparable gainful employment, 30 U.S.C. § 902(f), 20 CFR § 718.204(b) and (c) (2006). The regulations provide five methods to show total disability other than by the presence of complicated pneumoconiosis: (1) pulmonary function studies; (2) blood gas studies; (3) evidence of cor pulmonale; (4) reasoned medical opinion; and (5) lay testimony. 20 CFR § 718.204(b) and (d) (2006). Lay testimony may only be used in establishing total disability in cases involving deceased miners, and in a living miner's claim, a finding of total disability due to pneumoconiosis cannot be made solely on the miner's statements or testimony. 20 CFR § 718.204(d) (2006); *Tedesco v. Director, OWCP*, 18 B.L.R. 1-103, 1-106 (1994). There is no evidence in the record that the Claimant suffers from complicated pneumoconiosis or cor pulmonale. Thus I will consider pulmonary function studies, blood gas studies and medical opinions. In the absence of contrary probative evidence, evidence from any of these categories may establish disability. If there is contrary evidence, however, I must weigh all the evidence in reaching a determination whether disability has been established. 20 CFR § 718.204(b)(2) (2006); *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195, 1-198 (1986).

Both pulmonary function studies were non-qualifying. Thus, I cannot find total disability based upon the pulmonary function studies.

Both arterial blood gas studies were non-qualifying. Thus, I cannot find total disability based upon the arterial blood gas studies.

Dr. Sargeant found in 1992 that all of the Claimant's test results were normal. More recently, in 2004, Dr. Forehand found that the Claimant has pneumoconiosis, but also found that the Claimant has no pulmonary impairment. He based his opinion on the most recently available pulmonary function studies, arterial blood gas studies and other objective data of record. He provided adequate reasoning and documentation for his opinion. Thus, I find his report to be well-reasoned and well-documented, and accord it probative weight.

Although the Claimant testified that he would be unable to return to his coal mine employment, I cannot base a finding of disability solely on his testimony. I find that the opinion of Dr. Forehand, that the Claimant does not have a pulmonary or respiratory disability, is consistent with the weight of the medical evidence as a whole, including the pulmonary function and arterial blood gas studies. Thus I conclude that the Claimant has failed to establish that he is totally disabled by a pulmonary or respiratory impairment. For this reason, his claim for benefits must fail.

FINDINGS AND CONCLUSIONS REGARDING ENTITLEMENT TO BENEFITS

Because the Claimant has failed to meet his burden to establish that he is totally disabled by a pulmonary or respiratory impairment, he is not entitled to benefits under the Act.

ATTORNEY FEES

The award of an attorney's fee under the Act is permitted only in cases in which the claimant is found to be entitled to benefits. Section 28 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 928, as incorporated into the Black Lung Benefits Act, 30 U.S.C. § 932. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for services rendered to him in pursuit of this claim.

ORDER

The claim for benefits filed by the Claimant on January 20, 2004, is hereby DENIED.

A

ALICE M. CRAFT
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the Administrative Law Judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the Administrative Law Judge's decision is filed with the District Director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC, 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence

establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC, 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the Administrative Law Judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).